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No. 244

In the Supreme Court of the United States

October Term, 1956.

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION for WRIT of CERTIORARI

To the United States Court of Appeals for the Tenth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1956.

No. .....

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Tenth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, C. Ed Hackendorf, *d/b/a* Sun Bearing Supply, prays that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the decision of that court rendered April 5, 1957 (R., p. 3), rehearing denied May 28, 1957 (R., p. 49), affirming the judgment of the District Court of the United States for the Northern District of Oklahoma.

Opinions Below.

The Findings of Fact and Conclusions of Law of the District Court (O. R., p. 29), but are unreported.

The opinion of the Court of Appeals (R., p. 3) is not yet reported. (App., p. 1.)

Jurisdiction.

The date of the judgment, and the date of its entry, sought to be reviewed is April 5th, 1957.

The date of the order denying a rehearing is May 28, 1957.

The jurisdiction of the Court arises under U. S. C., Title 28, Section 1254.

QUESTION PRESENTED.

The article involved is a second hand automobile motor. It is known, in a manufacturing sense, as a combination—it is made up of complete component parts.

First Question.

Whether petitioner's activity of merely putting complete parts together, thus assembling a combination, is a manufacturing operation.

Second Question.

Whether Petitioner's Assembly department, maintained as a separate department, is equivalent to a separate entity, for excise tax purposes.

Third Question.

Whether the manufacturer's excise tax applies to the second sale of an automobile motor—a combination—when it is conceded that such tax does not apply to the second sale of an automobile which the motor becomes a part.

Fourth Question.

Whether the mere disassembling, cleaning, and reassembling of second hand motors by replacing worn out parts with new tax paid parts and resurfacing partially worn parts—on which petitioner pays a tax—constitutes repairs to the motor as a whole, when it is conceded that such reworking merely refits the motor to efficiently function during its normally expected life, and also when it is conceded that the same reworking operations performed on a second hand automobile, a second hand water pump, a second hand battery, a second hand windshield wiper

motor, etc., constitute reconditioning and not manufacturing.

FIFTH QUESTION.

Whether, in his reassembling operations, petitioner's use of parts produced by him and on which he pays the tax—incurs a further tax on the entire assembled motor upon his assembly and sale, when it is conceded that if he purchases from other entities, who pays the tax, the same parts he produces, instead of himself producing said parts, he incurs no tax whatsoever.

SIXTH QUESTION.

Whether, under subparagraph (c) of Article 4 of Regulation 46, petitioner should be regarded the same as a vendee of a motor in a knock down condition, with regard to his reassembly operations.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

Constitutional Provision Involved.

The constitutional provision involved is Clause 1, of Section 8 of Article 1, commonly known as the Uniformity Clause of the Constitution, which is as follows:

> "the congress shall have power to lay and collect taxes, duties, imposts, and excises * * * but all duties, imposts, and excises shall be uniform throughout the United States."

Statutes Involved.

The statutes involved here are as follows:

Internal Revenue Code (26 USCA), Sec. 3403:

> "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer,

a tax equivalent to the following percentages of the price for which so sold:

"(*a*) (Truck chassis, truck bodies, highway tractors);

"(*b*) (Other automobile chassis, bodies and motorcycles);

"(*c*) (As amended by Sec. 544 (a), Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 605 (c), Revenue Act of 1950, c. 994, 64 Stat. 906, and Section 481 (c), Revenue Act 1951, C. 521, 65 Stat. 452.) Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on or after April 1, 1954, the rate shall be 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this subsection shall not apply in the case of sales of parts or accessories by the manufacturer, producer, or importer to a manufacturer or producer of any of the articles enumerated in subsections (a) or (b). If any such parts or accessories are resold by such vendee otherwise than on or in connection with, or with the sale of, an article enumerated in subsections (a) or (b) and manufactured or produced by such vendee, then for the purpose of this section the vendee shall be considered the manufacturer or producer of the parts or accessories so resold. In determining the sale price of a rebuilt automobile part or accessory there

shall be excluded from the price, in accordance with regulations prescribed by the Secretary, the value of a like part or accessory accepted in exchange."

The Revenue Act of 1954 is substantially the same as the above.

Internal Revenue Code (26 USCA), Sec. 3443 (a) (1):

"(a) A credit against tax under this chapter, or a refund, may be allowed or made——

"(1) to a manufacturer or producer, in the amount of any tax under this chapter which has been paid with respect to the sale of any article (other than a tire, inner tube, or automobile radio taxable under Section 3404) purchased by him and used by him as material in the manufacture or production of, or as a component part of, an article with respect to which tax under this chapter has been paid, or which has been sold free of tax by virtue of Section 3442, relating to tax-free sales."

Internal Revenue Code (26 USCA), Section 3444 (a):

"(a) If—

(1) any person manufactures, produces, or imports an article (other than a tire, inner tube, or automobile radio taxable under Section 3403) and uses it (otherwise than as material in the manufacture or production of, or as a component part of, another article to be manufactured or produced by him which will be taxable under this chapter or sold free of tax by virtue of Section 3442, relating to tax-free sales); or

(2) any person manufactures, produces or imports a tire, inner tube, or automobile radio taxable under Section 3404 and sells it on or in connection with, or with the sale of, an article taxable under Section 3403 (a) or (b), relating to the tax on automobiles, or uses it; he shall be liable for tax under this chapter in

the same manner as if such article was sold by him, and the tax (if based on the price for which the article is sold) shall be computed to the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Commissioner."

Regulations Involved.

The Regulations involved are as follows (Regulations 46):

"Section 316.4. *Who Is a Manufacturer.* The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

"Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnished materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufacturers or produces it, will be considered the manufacturer.

"A manufacturer who sells a taxable article in a knock down condition, but complete as to all component parts, is liable for the tax and not the person who buys, and assembles a taxable article from such component parts."

"Sec. 316.55. *Definition of Parts or Accessories.* The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or orna-

mentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

"The term 'parts and accessories' shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

"Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use."

STATEMENT OF FACTS MATERIAL HERETO.

This action was brought to recover excise taxes required by defendant to be paid by Petitioner under Sec. 3403 (c), *supra*, of the Internal Revenue Code, for the period Nov. 1, 1952, to March 31, 1955. Petitioner, a resident citizen of Tulsa, Oklahoma, paid the tax on August 1, 1955, filed claims for refund, the total amount being less than $10,000.00. On November 8, 1955, the Commissioner of Internal Revenue disallowed the claims, and on November 9, 1955, Petitioner filed this suit under Code Section 3772, 26 U. S. C. A. 3772.

After trial by the court without a jury, judgment was entered for the defendant (C. of A. R., p. 33) and the Court of Appeals affirmed the judgment of the District Court (Tr., p. 12).

Section 3403 (c) of the Code imposes an excise tax equivalent to 8% of the sale price upon automobile parts and accessories against "the manufacturer" of such parts or accessories. The requirement by defendant that petitioner pay these taxes was made on the theory that petitioner was the manufacturer of the second hand motor which he assembled and sold.

The material facts are not in dispute.

During the period involved Petitioner was engaged in the business of reworking second hand automobile motors.

Petitioner's reworking operations consisted of disassembling, cleaning and reassembling the old motor. In the reassembling process Petitioner replaced the completely worn out parts with new tax paid parts, and himself machining the partially injured parts.

An ordinary motor consists of 52 different kinds of parts (C. of A. R.-119), but Petitioner machines only four of these 52 kinds, namely the cylinder block, the crankshaft, the valves, and connecting rods.

For the purpose of this suit, Petitioner does not seek a refund of the tax on these four parts which he machines. However, the only machining performed is resurfacing of only the portions making contact with other portions in the moving or reciprocating operations. The cylinder walls of the motor block are rebored to a smooth surface, usually about 10/1000ths of an inch; the valve seats that are in the motor block are reground to a smooth surface, usually about 10/1000ths of an inch; the crankshaft journals are reground to a smooth surface, usually about 10/1000ths of an inch; and connecting rods are reground to about the same degree.

The second hand parts merely cleaned, the new parts purchased tax paid, and the used parts machined (on which a refund is not asked), 52 different kinds of parts in all, sufficient for a complete motor, come to petitioner's assembly department in a complete stage of manufacture, the same as if Petitioner had purchased a motor (consisting of exactly the same parts) in a knock down condition.

The tax refund sought is tax in excess of the tax which would be paid defendant had petitioner purchased the same motor in a knock down condition.

The tax to be retained by defendant is the same as the tax that would have been paid had the same parts been sold in separate sales, and other than in an assembled motor.

Defendant concedes that, as of the time the completed components reach petitioner's assembly department, it receives a tax on all components going into the assembled motor, the same as if such completed components were sold separately or the same as if a complete motor was sold in a knock down condition, but it insists that it is entitled under the statute to a tax on the labor and overhead cost in putting the complete components together. Defendant also concedes that if Petitioner purchased new motors in a knock down condition and merely put them together Petitioner would owe no tax.

Defendant concedes, however, that petitioner is entitled under the proviso in Sec. 3403 (c) to a credit for the tax paid on the new parts, as if petitioner was a manufacturer of a chassis under Sec. 3403 (b), but denies that Petitioner is entitled under Sec. 3443 (a) (1) to a credit for the tax paid by the original manufacturer on the second hand parts used in the assembled motor.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT, AND ARGUMENTS THEREUNDER.

First Reason and Arguments.

The Court of Appeals for the Tenth Circuit rendered a decision in the case at bar which conflicts with the decision of the Court of Appeals for the Ninth Circuit, in the case of *United States* v. *Armature Exchange, Inc.*, (9 Cir.) 116 F. 2d 969, on the question of the rule of law defining what constitutes "repair" and what constitutes "reconstruction" of a machine, or combination, as defined by this Court in *Wilson* v. *Simpson*, (9 How.) 13 L. ed. 66, 60 U. S. 109, and followed by the Circuit Courts in *Goodyear Shoe Machinery Co.* v. *Jackson*, (1901) 112 Fed. 146, 55 L. R. A. 692; *Foglesong Machinery Co.* v. *J. D. Randall Co.*, 239 Fed. 893; *Ely Norris Safe Co*, v. *Mosler Safe Co.*, (2 Cir.) 52 F. 2d 524; *Hess-Bright Mfg. Co.* v. *Bearings Co.*, (D. C. Pa.) 271 Fed. 350.

The Court of Appeals for the Ninth Circuit, in *United States* v. *Armature Exchange, Inc.*, sought to apply the same identical statute, as is involved in this case, namely Sec. 3403 (c), to a used "armature," a component of a generator, and being a single piece of material. The facts in that case found that the used armature had the same relation to a completed armature as unused material had to a completed armature.

The taxpayer in that case urged the "combination" rule, *supra* (last par., p. 970), but the Ninth Circuit rejected the contention on the ground that such rule was applicable to a "combination" not to an individual part.

All of the 52 different kinds of parts going into Peti-

tioner's motor were completed components at the time they were received at Petitioner's assembly department.

Components complete within themselves do not have the same relation to the ultimate product as unused material has to the ultimate product, *Tidewater Oil Co.* v. *United States*, 171 U. S. 108, 18 S. Ct. 837.

The Congress in enacting the Excise Tax Statute did not define "manufacturing," therefore, the *Wilson* v. *Simpson* rule is still the law regarding the determination of whether a combination is "repaired", or is "reconstructed."

We believe the Ninth Circuit acknowledged the authority of this Court by recognizing that the *Wilson* v. *Simpson* rule applied to "combinations" under the statute involved. The Tenth Circuit in this case rejected such rule as applicable to a combination under the statute involved in this case.

It is without doubt that if the *Wilson* v. *Simpson* rule is applicable to a combination under the statute involved, as stated by the Ninth Circuit, then the Tenth Circuit was in error.

This Court should grant this application and settle the conflict.

Second Reason and Arguments.

The Court of Appeals for the Tenth Circuit rendered a decision in the case at bar which conflicts with applicable decisions of this Court in *Indian Motorcycle Co.* v. *United States*, 51 S. Ct. 601, 283 U. S. 570; *Wilson* v. *Simpson*, (9 How.) 13 L. ed. 66, 60 U. S. 109; and *Tidewater Oil Co.* v. *United States*, 171 U. S. 108, 18 S. Ct. 837; in holding that

Petitioner's ultimate product, the assembled second hand motor, was in effect a new motor manufactured by Petitioner.

This Court held in the *Indian Motocycle Co* case that the tax under this statute applied only to the first sale. That was because the tax was against the sale by the manufacturer "thereof," meaning the sale by the manufacturer of the article. A tax against any sale other than the first sale would not be against the manufacturer.

It is our understanding that defendant has left the *Indian Motocycle* case in the rear, and we understand they say they no longer follow it.

The Tax Statute is substantially the same wording as it was when this Court wrote the opinion in the *Indian Motorcycle Co.* case, and this Court interpretation in the *Indian Motorcycle Co.* case should still be the law until the act is changed by Congress.

Petitioner's ultimate product is no more a new product than the motorcycle was in the *Indian Motorcycle Co.* case, nor the planing machine in *Wilson* v. *Simpson*.

Third Reason and Arguments.

The Court of Appeals for the Tenth Circuit rendered a decision in the case at bar by departing from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The opinion rendered by the Tenth Circuit has the effect of writing regulations for the Treasury Department, rather than making a judicial interpretation of the meaning of the language employed in the act. This, of course, means judicial usurpation, and borders on the ground of legislating.

The Court falls into the error of flagrant discrimination with regard to the motor. The Treasury Department has made special rulings relating to second sales of (*a*) automobiles (second hand automobiles), (*b*) generators, (*c*) clutch assemblies, (*d*) water pumps, (*e*) windshield wiper motors, and other combinations. The generator ruling was promulgated into a regulation, but just prior to this trial it was withdrawn. (App. 25.) Each of these units are parts for automobiles, and to give an interpretation under Sec. 3403 (*c*) for one unit and a different interpretation for a different unit, under the same statute, certainly disregards Section 8 of Article 1 of the Constitution providing for uniformity of excise taxes.

The procedure for interpreting excise tax statutes was announced by this Court in *Hartranft* v. *Weigmann*, 121 U. S. 600, 7 S. Ct. 1243, and *Cadwalader* v. *J. & M. Paper Co.*, 149 U. S. 350, 13 S. Ct. 875.

The *Hartranft* case held that resurfacing by honing was not manufacturing, and that to constitute manufacturing a change of form or function must take place. That case further stated that if "cut" coral was to be treated as a manufacture, Congress must expressly say so.

The *Cadwalader* case held that to consider prior manufactures as raw material for a new manufacture such manufactures must lose its commercial value as prior manufactures.

The Tenth Circuit failed to follow this Court's rules, laid down in those cases.

In fact, the Tenth Circuit's opinion is contradictory within itself. For instance the very first sentence is contradictory, *e. g.*, "The plaintiff was engaged in the busi-

ness of reconditioning or rebuilding automobile motors for sale."

Petitioner's ultimate product cannot be both a "reconditioned" motor and a "rebuilt" motor. It must be one or the other, but it cannot be both. It is very clear that the Tenth Circuit did not take time to distinguish the meaning of "reconditioned" and "rebuilt."

The Tenth Circuit did not attempt to follow any regulation, as provided by Sec. 3450. Neither did the Tenth Circuit attempt to make an interpretation of the Act sufficiently to announce a definite rule which could be applied to any set of facts.

The Tenth Circuit simply said "me too" without making any judicial interpretation of its own, a procedure not commendable to any court independent in its existence.

Fourth Reason and Arguments.

The Court of Appeals for the Tenth Circuit in the case at bar decided an important question of federal law which has not been, but should be, settled by this Court.

This Court should take jurisdiction of this case so as to make an interpretation of the entire Act; setting out rules which can be applied as the Uniformity Clause provides.

In addition to making an interpretation of "manufacturing," a rule should be laid down with regard to the credits under Section 3443 (a) (1) to the tax previously paid on the second hand components that enter into the ultimate product.

Section 3443 (a) (1) provides that if an entity is a manufacturer of an ultimate product and purchases and

uses material in its manufactures the tax previously paid will be allowed as a credit, but the Commissioner of Internal Revenue will not allow this credit, neither would the Tenth Circuit, and although it said credits would be allowed, it did not allow such credits.

No regulations have been promulgated spelling out rules to determine the tax in these circumstances, but the Congress provided that the Treasury Department do so. 26 U. S. C. 3450

Neither have regulations been promulgated to determine whether or not merely putting parts together is manufacturing. This Court, in the *Tidewater Oil Co.* case, held that merely putting parts together was not manufacturing subject to drawbacks under an import duty.

The Tenth Circuit did not settle the state of confusion existing in the operation of this statute. Even subsequent to the Tenth Circuit's decision in this case on April 5, 1957, the Treasury Department on May 10, 1957, issued another ruling relating to repairing a second ~~hand automobile~~ which outlines a procedure precisely as we contended for in this case for the second hand motor. (App. 29.)

There has been more confusion in this statute than any other taxing statute we have ever heard of. In the first place the Treasury Department, after twenty-five years, has not promulgated regulations to take care of the statutes. In the next place the Treasury Department is seeking to make "pocket" rulings for specific units and refusing to permit such rulings to be applied to other units under the same statute. There are differences of opinion among departmental heads, and in many instances the courts refuse to follow the rulings and regulations that are in effect.

Among the cases refusing to follow the rulings are:

Martin Tire Co. v. United States, (D. C. S. D., Fla.) 130 F. Supp. 316, involving putting together components of a battery; no appeal;

Goede v. *Westover*, (D. C. S. D., Cal.) 45 A. F. T. R. 1275, involving putting together a water pump; no appeal;

Sealed Power Corp. v. *Kavanaugh*, (D. C. E. D. Mich.) 81 F. Supp. 459, involving a parts package less than a complete article; no appeal;

A. P. Bardet & Co. v. *United States*, (D. C. N. D. Cal.) 23 A. F. T. R. 1198, involving connecting rods; no appeal;

Con-Rod Exchange v. *Henrickson*, (D. C. W. D. Wash.) 28 F. S. 924, involving connecting rods; no appeal;

J. Leslie Morris Co. v. *United States*, (D. C. S. D. Cal.) 40-2 U. S. T. C. 9608, involving connecting rods; reversed on appeal;

Morology Bearing Service v. *United States*, (D. C. N. D. Cal.) 40-2 U. S. T. C. 9619, involving connecting rods; reversed on appeal;

Armature Rewinding Co. v. *United States*, (D. C. E. D. Mo.) 40-2 U. S. T. C. 9691; involving armatures for generators; reversed on appeal.

The above cases illustrate the need for this Court to take jurisdiction and settle the questions arising on the application of the statutes to these second hand articles.

CONCLUSION.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit commanding that court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings in the United States Court of Appeals for the Tenth Circuit, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the United States Court of Appeals for the Tenth Circuit be reversed; and that Petitioner be granted such other and further relief as may be proper.

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Attorneys for Petitioner.

I hereby certify that I have this the 26 day of June, 1957, served two copies of the above Application for Writ of Certiorari on Respondents by mailing one copy to Hon. B. Hayden Crawford, United States Attorney, Tulsa, Oklahoma, and one copy to Hon. Chas. K. Rice, Assistant Attorney General, Washington, D. C., Attorneys of Record for Respondent.

R. F. Roberts
R. F. ROBERTS.

APPENDIX.

Opinion.

(FILED: United States Court of Appeals, Tenth Circuit, Apr. 5, 1957; Robert B. Cartwright, Clerk.)

UNITED STATES COURT OF APPEALS,
Tenth Circuit.

No. 5445—March Term, 1957.

C. Ed. Hackendorf, d/b/a Sun Bearing Supply, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma.

R. F. Roberts, Beaumont, Texas, (S. J. Clendenning, Tulsa, Oklahoma, was with him on the brief), for Appellant;

Earl E. Pollock, Washington, D. C., (Charles K. Rice, Assistant Attorney General, Lee A. Jackson, Robert N. Anderson, Walter Ackerman, Jr., Attorneys, Department of Justice, Washington, D. C., and B. Hayden Crawford, United States Attorney for the Northern District of Oklahoma, prepared the brief), for Appellee.

Before BRATTON, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

The plaintiff was engaged in the business of reconditioning or rebuilding automobile motors for sale. He brought this action to recover a manufacturers' excise tax alleged to have been erroneously assessed and collected under the

provisions of Sec. 3403(c) of the Internal Revenue Code of 1939, as amended, and Sec. 4061(b) of the Internal Revenue Code of 1954, during the period beginning November 1, 1952, through March 1955. This is an appeal from a judgment holding the sales were subject to the manufacturers' tax provided for in the statute.

Relying upon decisions distinguishing manufacturing or reconstruction from repair in other types of cases, plaintiff vigorously insists that he does no more than replace worn out automobile parts for the purpose of preserving the motors as a whole.[1] In other words, he says that by his process he replaces only worn out essential parts to preserve a machine which is a combination of parts. In applying the statutes, we think the contention is untenable.

The facts are not in dispute. During the period in question the plaintiff acquired old automobile motors which had ceased to function efficiently or to function at all. In some instances the motors were purchased from automotive salvage companies, but most of them were acquired through trade-in allowances from his wholesale customers when purchasing rebuilt motors. In the process of rebuilding, the motors were completely dismantled and the component parts thoroughly cleaned. The different parts were then inspected and placed in compartments containing parts from the same type and make of motors. The motor blocks, crankshafts, valves and connecting rods were machined with special equipment. Plaintiff's reworking operations consisted of resurfacing of the cylinder walls by reboring the block, resurfacing of the crankshaft journals, valves, valve seats and connecting rods with emery wheels and honing stones. There were new bearings in all motors. No attempt was made to replace salvaged parts in the same block from which they were taken. The parts were used on an

1. Typical of these cases are Wilson v. Simpson, et al., 50 U. S. 108; Hartranft v. Wiegmann, 121 U. S. 609, and General Motors Corp. v. Preferred Elec. & Wire Corp., 79 F. 2d 621, cert. den. 296 U. S. 655.

assembly line in the production of rebuilt motors.[2] When the motors were reassembled, parts which were worn to the extent that they were unusable were replaced by new parts upon which the tax had been paid. The finished product was sold at a fixed price for each model and the taxpayer gave a new motor warranty to the purchaser. The sales averaged 85 or 90 motors per month.

Section 3403 of the Internal Revenue Code of 1939, as amended, provides that "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold: * * * (c) Parts or accessories

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2. As to plaintiff's process, the trial court made these findings:

"6. Sun completely disassembles the old engines that it acquires, cleans and degreases the various components, and then inspects those components to determine which are salvageable. Since Sun uses new pistons, new bearings, and timing chains in its rebuilt engines, those components of the old engine are invariably discarded. In addition the condition of any one or more of the other components of the old engine may be such as to require discard.

"7. Salvageable blocks, crankshafts, valves and, in most instances, connecting rods obtained by Sun from old engines are machined or rebuilt by Sun with specialized equipment to make them useable, as follows: The blocks are bored to give the cylinders a uniform size, the valve ports are refaced or reseated, and cracks in the block are cold welded. The crankshaft bearing surfaces are reground. Connecting rods for most of the rebuilt engines produced by Sun are reground. Valves are refaced. Other components of the engine, if salvageable at all, do not require machining before use.

"8. The parts salvaged by Sun from its old engines and the new parts purchased tax paid by Sun are placed in separate storage bins according to type. Sun then produces rebuilt engines on an assembly line utilizing salvaged parts and newly manufactured parts. Salvaged parts do not customarily go back into the engine block from which they may have originated.

"9. With the exception of the camshaft, and in some model engines, the connecting rods, every major component of Sun's rebuilt engines is either a newly manufactured part that has been purchased tax paid by Sun or is a salvaged part that Sun has machined in order to make useable.

"10. The rebuilt engines produced by Sun are a new and different article from the old engines which it has used as a source of salvageable parts."

(other than tires and inner tubes and other than radio or television receiving sets) for any of the articles enumerated in subsection (a) or (b), * * *.3' (Subsections (a) and (b) refer to automobiles.) Section 4061 of the 1954 Internal Revenue Code is to the same effect. Section 316.4 of Treasury Regulation 46, (1940 Ed.), defines a manufacturer to include "a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles. Administrative rulings are to the same effect."

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3. Treasury Rev. Rul. 54-329, 1954-2 Cum. Bull. 405, defined a "manufacturer" as a person who was engaged in the production of rebuilt auto parts or accessories for sale or for use in further manufacture of other articles for sale, as follows:

"(2) *Rebuilding.*—Reboring or other machining, rewinding, and comparable major operations performed on used parts being processed for sale or for use as components of other articles for sale are defined as rebuilding operations constituting manufacture for purposes of the tax. The person owning parts being rebuilt for such disposition is the rebuilder (manufacturer) and is liable for the tax on his sales of the rebuilt parts or on their use as components of other articles manufactured by him for sale. The tax applies whether the machining, etc., operations are performed by the rebuilder himself or by some other person in his behalf.

"The manufacturers' excise tax applies to the rebuilder's sale of (a) rebuilt batteries, (b) rebabbitted or machined connecting rods, (c) resurfaced clutch plates, (d) rewound armatures, (e) reground or remetalized crankshafts, (f) engines in which blocks are machined (e.g., cylinders rebored, new sleeves inserted, with or without cylinders being rebored) or new blocks installed, and (g) similar parts on which machining, rewinding, or comparable operations are performed.

"The tax due upon the sale of a rebuilt part is based upon the price for which such part is sold, excluding the value of a like part accepted in exchange. The tax due on the use of a rebuilt part as a component of another article manufactured by the rebuilder for sale is based upon the price for which such or similar rebuilt parts are sold in the ordinary course of trade, excluding the value of a like part accepted in exchange. Where a taxpaid part is used as a component in the manufacture of the rebuilt part, appropriate relief through refund or credit may be obtained pursuant to the provisions of section 3443 (a) (1) of the Code."

The courts have generally held that rebuilding automobile parts such as armatures, generators, and connecting rods for sale constitutes manufacturing within the meaning of the statute, and sales of the rebuilt products are subject to the manufacturers' tax. Clawson & Bals v. Harrison, 7 Cir., 108 F. 2d 991, cert. den. 309 U. S. 685; United States v. Armature Exchange, 9 Cir., 116 F. 2d 969, cert. den. 313 U. S. 573; United States v. J. Leslie Morris Co., 9 Cir., 124 F. 2d 371; United States v. Moroloy Bearing Service of Oakland, Ltd., 9 Cir., 124 F. 2d 373; United States v. Armature Rewinding Co., 9 Cir., 124 F. 2d 589; Clawson & Bals v. United States, 7 Cir., 182 F. 2d 402, cert. den. 340 U. S. 883[4]; Monteith Bros. Co. v. United States, 7 Cir., 142 F. 2d 139; Broad Motors Co. v. Smith, 86 F. Supp. 4. There is no material difference in the rebuilding of armatures, generators, and connecting rods, and in rebuilding motors. Each is made up of component parts which are reworked

4. In the case of Clawson & Bals v. United States, 182 F. 2d 402, 405, the court said:

"The plaintiff contends that its reconditioning of these rods did not amount to 'rebuilding' but only to 'repairing.' The Merriam-Webster New International Dictionary defines 'rebuild' as 'to build again or to construct anew, usually the parts that are in good condition and some new parts being used.' The reconditioning done by plaintiff would seem to fit this definition. Plaintiff's attempt to distinguish between 'rebuilding' and 'repairing' was not convincing. The dictionaries give 'repair' as one of the synonyms of 'rebuild.' We think the common use of 'rebuild' is the making of such extensive repairs on an object as to make it again useful for a period, almost as if it were new.

"However, regardless of the exact definition of 'rebuild,' the above quotation from the Senate Finance Committee had reference to the very type of reconditioning we are here considering. They there called such reconditioned parts 'rebuilt' parts and said they should be subject to the same tax as new parts.

"This statement by the Senate Finance Committee is significant. It discloses that the attention of Congress had actually been called to some of the cases which we have cited above and that Congress had accepted these decisions as correctly interpreting the Congressional intent on this matter. This constitutes Congressional ratification of the interpretation of this Section by the courts and should be considered just as binding on the courts as if such reconditioned parts were expressly included in the Act."

er replaced when necessary. The end product in either case is a finished part of an automobile ready for installation. Furthermore, it appears that Congress expressly recognized that rebuilt automobile parts are subject to the manufacturers' tax by refusing to exempt specifically such rebuilt parts. In considering the Revenue Bill of 1941, the Senate Finance Committee reported as follows:

> "It was urged that this section be amended to specify that repaired, reconditioned, and rebuilt automobile parts and accessories are not subject to the 'parts and accessories' tax. Your committee examined the problem very carefully. Repaired and reconditioned parts are not now subject to tax. There are several decisions of the United States circuit courts of appeals holding rebuilt parts and accessories to be subject to the manufacturers' tax. Rebuilt parts compete with new parts, and it appears appropriate that they should be subject to the same tax. Accordingly, no change has been made."—S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., p. 48.

Automobile motors, whether new or rebuilt, are single functional units and are usually sold as such for installation in motor vehicles. They are a necessary "part" of an automobile and taxable if manufactured and sold. It is unimportant that they may be made up of component parts which are subject to the tax if sold separately. The statute provides that if taxable component parts are used in manufacturing or producing a taxable part, a credit shall be allowed.

Judgment affirmed.

Generator Ruling.

U. S. TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue
Refer to: T:R;ExS MS September 10, 1954

Halfpenny & Hahn
111 West Washington Street
Chicago 2, Illinois

Attention: Mr. Richard F. Hahn

Gentlemen: This is in reply to your letter dated May 26, 1954, in which you request a ruling in connection with the applicability of the manufacturers' excise tax imposed under section 3403(c) of the Internal Revenue Code to certain operations performed upon automobile parts being processed for sale.

In your first question you request advice as to whether the following operations are considered to be reconditioning or a major operation comparable to reboring, machining or rewinding, and constitute rebuilding.

"(a) Honing of engine, shock absorber, brake or windshield-wiper cylinders;

"(b) Reaming of such cylinders;

"(c) Filing of armature commutators;

"(d) Insertion of tax-paid pre-formed coils in armatures?"

The operations listed under (a), (c) and (d) are not considered to be rebuilding operations. The tax imposed under section 3403(c) of the Code does not attach to sales of the articles listed which are re-conditioned in such manner.

With respect to (b), the reaming of the cylinders is considered to be a rebuilding operation. The rebuilder who rebuilds in such manner cylinders owned by him, is liable for tax on his sale of such rebuilt parts or on his use of such rebuilt parts as components of other articles manufactured by him for sale.

With respect to question (a)* under 2, the A Company would be liable for tax only on its use of the rewound armature as a component of another article which it sells. The tax is to be based on the price for which similar rewound armatures are sold by it at wholesale. Under (b)*, the B Company does not incur any liability for tax upon the sale of the generators where it purchases "rebuilt" armatures and reassembles such armatures with the other components of the generators which have been merely disassembled and cleaned.

Very truly yours,

/s/ R. J. Bopp
Chief, Excise Tax Branch

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*NOTE: Questions (a) and (b) under 2, read:

"(a) The A Company sells used generators upon which the following operations are performed by it. The armatures are 'rebuilt' by rewinding. The other components are merely disassembled, cleaned and reassembled (with necessary replacement of worn parts with tax-paid parts). Upon sale of the generator, is the tax based upon the price of the 'rebuilt' armature, or of the entire generator consisting of a 'rebuilt' armature and 'reconditioned' other components?

"(b) The B Company sells used generators. It purchases tax-paid 'rebuilt' armatures and reassembles the same with other components which have been merely disassembled and cleaned. Does B Company incur any liability for tax upon the sale of such generators? If so, based upon the price of what?"

Amplification of Generator Ruling.

SECTION 3403.—TAX ON AUTOMOBILES, ETC.

Regulation 46, Section 316.4: Who is a Manufacturer. Rev.Rul.55-98

(Also Section 316.55; Section 3444, Section 316.7.)

In the "reconditioning" of a used generator, which requires the replacement of the armature with one that has been rewound by the person restoring the generator to useful condition for sale, a manufacturing or "rebuilding" operation is performed on the armature only, and the tax is computed upon the established selling price of the armature component.

Revenue Ruling 54-329, I.R.B. 1954-33,12, amplified.

Advice has been requested concerning the method of determining the tax due when a "rebuilt" armature is used in "reconditioning" a generator for sale (including exchange).

An automobile shop operates a generator exchange service. A generator accepted in an exchange is disassembled and cleaned, the armature is rewound or replaced with a previously rewound armature, and the generator is then reassembled, repainted, and placed in stock for subsequent exchange. The exchange price of such a generator is $10, while the established exchange price of a rewound armature is $1.50.

In the instant case the rewinding of the armature constitutes a "rebuilding" operation on a part which is then used as a component in the "reconditioning" of the generator. The tax should be based, therefore, upon the estab-

lished selling price of such a "rebuilt" armature, namely $1.50, excluding the value of a like part accepted in exchange.

Revenue Ruling 54-329, supra, amplified.

2/21/55
I. R. B. 1955 - 8, 29

Clutch Ruling.

U. S. TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue
Refer to: T:R:ExS MS October 11, 1954

Halfpenny & Hahn
111 West Washington Street
Chicago 2, Illinois

Attention: Mr. Richard F. Hahn

Gentlemen: This is in reply to your letter dated September 22, 1954, in which you request a ruling as to the applicability of the tax imposed under section 3403(c) of the Internal Revenue Code of 1939, to sales of used clutch pressure plate assemblies in the two questions set forth below:

"1. The A Company sells used clutch pressure plate assemblies (each unit consisting of a pressure plate, levers, springs, bolts, nuts and housing), upon which the following operations are performed by it. The pressure plates are 'rebuilt' by regrinding the faces thereof. The other components are merely disassembled, cleaned and reassembled (with necessary replacement of worn parts with tax-paid parts). Upon sale of such a clutch pressure plate assembly, is the tax based upon the price for which the 'rebuilt' pressure

plate is sold in the ordinary course of trade as wholesale, or upon the price of the entire assembly consisting of a 'rebuilt' pressure plate and 'reconditioned' other components?"

The A Company is liable for the tax imposed under section 3403(c) of the Code on its sales of the reground or resurface clutch plates. The tax is to be based on the price for which the rebuilt pressure plates are sold by it in the ordinary course of trade at wholesale. No tax attaches to the sale by the A Company of the used pressure plate assemblies.

"2. The B Company sells used clutch pressure plate assemblies. It purchases tax-paid pressure plates, either new or 'rebuilt,' and reassembles the same with the other components of the assemblies which it has merely disassembled and cleaned. Does B Company incur any liability for tax upon the sale of such assemblies?"

The B Company incurs no liability for tax under section 3403(c) of the Code on its sale of the used clutch pressure plate assemblies.

Very truly yours,

/s/ R. J. Bopp
Chief, Excise Tax Branch

Second Hand Auto Ruling.

T:R:ExS
LaC

Apr 10 1957

Mr. Tom DeWitt
5621 Washington Boulevard
Houston, Texas

Dear Mr. DeWitt: We are in receipt of a letter from Mr. Seymour Lieberman of your city, inquiring whether the

manufacturers excise tax on automobiles, etc., imposed by section 4061(a) of the Internal Revenue Code of 1954, applies to used cars which are repaired and sold by you. The nature of repairs which you make to the vehicles is described in his letter. Mr. Lieberman's letter was transmitted to this office by letter from Mr. Charles M. Trammell of the law firm of Trammell, Hand and Nathan of this city.

The manufacturers excise tax does not apply to the second sale of a vehicle taxable under section 4061(a) of the Code. In view thereof, your sales of used cars are not subject to the tax.

Section 4061(b) of the Code imposes upon parts or accessories (other than tires and inner tubes and other than automobile radio and television receiving sets) for any of the vehicles taxable under section 4061(a) sold by the manufacturer, producer, or importer a tax equivalent to 6 per cent of the price for which so sold. Attention is invited to the fact that liability to the tax is incurred by the person who sells an automobile part or accessory taxable under section 4061(b) of the Code for repair or replacement purposes. In view thereof such articles may not be purchased by you tax-free. Liability is likewise incurred by you on taxable parts or accessories which are manufactured by you for incorporation in the used cars.

Our reply is made directly to you inasmuch as the records of this office do not disclose that a power of attorney authorizing either Mr. Lieberman or Mr. Trammell to represent you has been filed with this Service.

Very truly yours,

(Signed) R. J. Bopp
Chief, Excise Tax Branch

LAChance:mmp-4-5-57
cc: DD:Audit:Austin
cc:ARC:Audit-Dallas